incurred by a borrower. The Court held that RESPA is meant to regulate the amount of money a borrower is required to deposit in escrow by tying it to the costs the escrow fund is meant to secure. However, RESPA is not designed as a revenue producer, in the form of escrow interest, even if the net result is to reduce the expense to the borrower.

Finally, the Court rejected Petitioners' contention that, by availing itself of the option afforded by federal regulation to not pay escrow interest, the Bank was automatically transformed into a state actor for purposes of a Fifth Amendment taking claim.

REASONS FOR DENYING THE PETITION

I. The Second Circuit Correctly Concluded That HOLA And The HOLA Regulations Preempt The New York Escrow Statutes

This Court's Rules provide that a petition for a writ of certiorari will be granted only for "compelling reasons," and in certain limited circumstances, Sup. Ct. R. 10 (a) – (c). This case presents none of these circumstances, nor any compelling reasons for the review sought. The Second Circuit's decision is consistent with relevant decisions of other United States courts of appeal and with this Court's own decisions. Petitioners' application should therefore be denied.

A. The HOLA Regulations Are Based Upon Reason And Within HOLA's Authority

Petitioners attack the Second Circuit's preemption decision on two bases. First, they argue that Congress intended RESPA — not HOLA — to govern a federal savings association's obligation to pay interest on escrow accounts. Second, Petitioners contend the OTS acted arbitrarily when it enacted

the HOLA Regulations. Each claim, however, is directly contrary to all indications of congressional intent, and neither can be squared with this Court's declaration confirming the wide-ranging mandate of HOLA and the plenary authority of the OTS. Both claims also are undermined by HUD's pronouncement that it *does not* have authority under RESPA to regulate a lender's obligation to pay interest on escrows.

The Second Circuit undertook a straightforward assessment of Congress' intent with respect to both Acts. It correctly concluded that the HOLA Regulations are based upon reason and are within HOLA's grant of authority. The Second Circuit also correctly concluded that RESPA and HOLA are not coextensive; rather, RESPA "regulates a narrow field of financial transactions engaged in by a broad group of financial institutions" while HOLA "regulates a specific breed of financial institutions in respect of all their transactions and activities." Appendix A – Opinion of the United States Court of Appeals for the Second Circuit Decided January 21, 2005 ("Opinion") at 10a.

As the Second Circuit noted, federal regulations have the same preemptive effect as federal statutes as long as the administrator has not exceeded his statutory authority or acted arbitrarily. Opinion at 5a. As a result, the Second Circuit addressed directly whether the OTS regulation preempting state laws concerning escrow accounts was either in excess of statutory authority or arbitrary.

First, the Second Circuit reasoned, there is no presumption against federal preemption "when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). The field of banking is one such area. *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002). Through

HOLA, Congress established a "significant federal presence," regulating all aspects of the operation of federal savings associations. *de la Cuesta*, 458 U.S. at 144. As this Court declared,

> Congress delegated to the [Federal Home Loan Bank Board ("FHLBB"), now the OTS] broad authority to establish and regulate 'a uniform system of [savings and loan] institutions where there are not any now,' and to 'establish them with the force of the government behind them, with a national charter.' . . . And the [OTS] has exercised that discretion, regulating comprehensively the operations of these associations, including their lending practices and, specifically, the terms of loan instruments.

Id. at 166 (citation omitted).[3] Next, the Second Circuit looked at Congressional intent. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-486 (1996), *cert. denied*, 538 U.S. 1069 (2003). The Second Circuit noted the "extremely broad grant of power" afforded by HOLA, specifically citing its statutory provisions that "[t]he Director [of the OTS] may issue such regulations as the Director determines to be appropriate to carry out the responsibilities of the Director or the Office," and that "the Director is authorized, under such regulations as the Director may prescribe, to provide for the . . . operation and regulation of associations to be known as Federal savings associations." Opinion at 6a-7a. This language establishes the OTS' extensive authority to regulate all aspects of federal thrifts' lending operations.[4]

---

3. The OTS is the successor to the FHLBB. Except as otherwise noted, the FHLBB will be referred to as the "OTS."

4. *See also* 12 U.S.C. § 1462a(b)(2) ("The Director may prescribe such regulations and issue such orders as the Director may determine to be necessary for carrying out this chapter and all other laws within the Director's jurisdiction.")

More than twenty years ago, this Court confirmed that Congress intended the OTS to have plenary and exclusive authority to regulate, monitor and examine federal savings associations from cradle to grave. *de la Cuesta*, 458 U.S. at 160 ("The broad language of §5(a) expresses no limits on the [OTS'] authority to regulate the lending practices of federal savings and loans."); *see Conference of Fed. Sav. and Loan Ass'ns v. Stein*, 604 F.2d 1256, 1260 (9th Cir. 1979) ("In our judgment the regulatory control of the [OTS] over federal savings and loan associations is so pervasive as to leave no room for state regulatory control"), *aff'd*, 445 U.S. 921 (1980). As this Court observed, "'it would have been difficult for Congress to give the [OTS] a broader mandate.'" *de la Cuesta*, 458 U.S. at 161 (citations omitted). In enacting HOLA, Congress intended to rectify the inadequacies of the existing state systems and, in doing so, Congress clearly envisioned that "federal savings [associations] would be governed by what the [OTS] — not any particular State — deemed to be the 'best practices.'" *Id.* (citation omitted).

In keeping with this Congressional mandate, the HOLA Regulations explicitly restate the OTS' intent to occupy the entire field of lending regulation for federal thrifts: "OTS hereby occupies *the entire field of lending* regulation for federal savings associations." 12 C.F.R. § 560.2(a) (emphasis added). Consistent with congressional intent, "[t]his exercise of the [OTS'] authority is preemptive of *any* state law purporting to address the subject of the operations of a Federal savings association." 12 C.F.R. §545.2 (1996) (emphasis added). "Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law." *de la Cuesta*, 458 U.S. at 162.

The rationale for the exercise of this plenary authority is explicit and reasoned, as the Preamble to the HOLA Regulations explains.

> [I]nstead of being subject to a hodgepodge of conflicting and overlapping state lending requirements, federal thrifts [shall be] free to originate loans under a single set of uniform federal laws and regulations. This furthers both the "best practices" and safety and soundness objectives of the HOLA by enabling federal thrifts to deliver low-cost credit to the public free from undue regulatory duplication and burden. At the same time, the interests of borrowers are protected by the elaborate network of federal borrower-protection statutes applicable to federal thrifts. . . .

61 Fed. Reg. 50951-01, 50965 (Sept. 30, 1996).

The HOLA Regulations have a rational basis because they directly serve the purpose of HOLA. Pursuant to HOLA, the Federal Home Loan Bank Board created a national system of savings and loan associations to deliver low-cost credit to the public free of undue regulatory duplication and burden. 61 Fed. Reg. at 50965 (Preamble to HOLA Regulations). Because a federal association has the ability to "branch" anywhere throughout the United States and its territories, 12 C.F.R. § 545.93(a), and lending lies at the heart of the business of a federal association, 61 Fed. Reg. at 50965, subjecting federal associations to the "hodgepodge of conflicting and overlapping state lending requirements," *id.*, would harm the efficient operation of a federal association.

The Second Circuit also specifically held that the broad powers conferred upon the OTS to regulate the operation of

savings and loans gave it ample authority to promulgate and enforce regulations concerning escrow accounts. That determination is similarly correct. Congress' explicit delegation to OTS of jurisdiction over the "operation" of savings and loans "must empower the [OTS] to issue regulations governing mortgage loan instruments, for mortgages are a central part of any savings and loan's 'operation.'" *de la Cuesta*, 458 U.S. at 161.[5] That function necessarily encompasses mortgage escrow accounts. *See Wisconsin League of Financial Institutions, Ltd. v. Galecki*, 707 F. Supp. 401, 405 (W.D. Wis. 1989) (there can be "no dispute" that the "phrase [operations of a federal Association] extends at least to the regulation of mortgage escrow accounts"); *Greenwald v. First Fed. Sav. Loan Ass'n of Boston*, 446 F. Supp. 620, 624 (D. Mass. 1978) (HOLA Regulations preempt state laws requiring payment of interest on mortgage escrow funds held to pay real estate taxes), *aff'd*, 591 F.2d 417 (1st Cir. 1979).

The OTS has therefore explicitly provided, 12 C.F.R. § 560.2(b)(6), that:

> the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding:
>
> * * *
>
> (6) Escrow accounts, impound accounts and similar accounts; . . . .

5. *See, e.g., First Fed. Sav. and Loan Ass'n of Lake Worth v. Brown*, 707 F. 2d 1217, 1221 (11th Cir. 1983) (Board's regulations governing due-on-sale provisions preempts state law limitations on the due-on-sale practices of federal savings and loan associations); *Haehl v. Washington Mut. Bank, F.A.*, 277 F. Supp. 2d 933, 942 (S.D. Ind. 2003) (HOLA Regulations preempt state law allowing banks and savings associations to pass on to customers only bona fide reconveyance fees).

While the Second Circuit noted that this specific regulation pertaining to escrow accounts had not previously been adjudicated in the Second Circuit, the Court found ample analogous precedent demonstrating that the regulation was within reason and within HOLA's grant of authority. The Court likened the escrow regulation to, among others, HOLA's regulation concerning the inclusion of "due-on-sale clauses" that this Court considered and upheld in *de la Cuesta*. Moreover, the Second Circuit found significant that the HOLA Regulations afford the parties the opportunity to contract out of the preemptive effect of the Regulations, and negotiate for the payment of escrow interest. This ability to contract out of the federal regulatory framework "provides a consistent nationwide playing field while giving individual institutions a level of flexibility. This achievement alone demonstrates that preemption in this field is sensible enough to dodge accusations of arbitrariness in the abstract." Opinion at 8a.[6]

---

6. The only cases Petitioners cite specifically addressing the New York Escrow Laws are inapposite. *Jamaica Sav. Bank v. Lefkowitz*, 390 F. Supp. 1357 (E.D.N.Y.), *aff'd*, 423 U.S. 802 (1975), concerned the constitutionality of a New York escrow statute as applied to a state-chartered bank, a fact that Petitioners concede. By contrast, the case before this Court concerns HOLA's preemption of such a statute insofar as it purports to govern *federally-chartered* institutions. *Federal Nat. Mortg. Ass'n v. Lefkowitz*, 390 F. Supp. 1364 (S.D.N.Y. 1975), also cited by Petitioners, concerned the Federal National Mortgage Association ("FNMA") — not a federal savings association. Further, the court was persuaded that FNMA should comply with New York escrow statutes because

> Congress has not indicated whether FNMA should be exempt from the type of state regulation established by [the statutes]. In the absence of such a specific authorization, we find that the payment of interest on the

(Cont'd)

Because the HOLA Regulations are consistent with congressional intent, the OTS' interpretation of those regulations is entitled to substantial deference. *Medtronic*, 518 U.S. at 496; *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (interpretation of a statute by the officers or agency charged with its administration is entitled to "great deference"). The OTS has explicitly found that state escrow laws in general, and the New York Escrow Laws in particular, are preempted, consistently reaffirming that result in its opinion letters addressing that issue. OTS Op. Chief Counsel dated October 6, 2003 (specifically stating that the New York Escrow Statutes at issue in this case are preempted) (A-180)[7]; Opinion of the General Counsel of the Federal Home Loan Bank Board ("FHLBB Op. General Counsel") dated August 13, 1985 (addressing the scope of federal preemption in light of New York law requiring the payment of interest on escrow accounts, and stating the New York laws are preempted) (A-83); OTS Op. Chief Counsel dated January 3, 1991 (stating that section 953 of the New York Real Property Tax Law – relied upon here by Petitioners – is preempted by the HOLA Regulations) (A-86).[8]

(Cont'd)

> escrow accounts does not impose such a burden on the performance of FNMA's function as to invalidate the statute.

390 F. Supp. at 1368. Here, pursuant to its congressional mandate, the OTS has stated in no uncertain terms that the HOLA Regulations do preempt state escrow statutes, thus exempting federal associations from their reach.

7. References to the Joint Appendix on Appeal to the Second Circuit Court of Appeals are designated herein as "A-__".

8. *See also* FHLBB Op. General Counsel dated September 24, 1984 (Maine state laws purporting to impose obligations on federal associations to pay interest on escrow accounts "other than those

(Cont'd)

Petitioners contend that the Second Circuit erred because the issue is whether preemption by the HOLA Regulations is consistent with Congressional intent under RESPA, and that the Second Circuit's analysis turned "on its head" the "primacy of Congress' intent . . ." Petition for a Writ of Certiorari ("Petition") at 16. Rather, it is Petitioners' argument that turns the law "on its head." The issue is whether preemption by the HOLA Regulations is consistent with congressional intent under *HOLA* – not under RESPA. Petitioners' contrary premise is the fundamental error that informs their entire analysis.

Petitioners contend that HOLA does not govern escrow accounts because no provision in the Act specifically mentions that area. Citing certain provisions of RESPA that address discrete aspects of escrow accounts, Petitioners advocate that RESPA governs every aspect of a federal thrift's operation of an escrow account. Having postulated such widespread application of RESPA, Petitioners contend RESPA's so-called "savings clause," 12 U.S.C. § 2616, blocks the preemptive effect of HOLA's federal regulations. The hidden assumptions contained in this analysis fatally undermine its conclusion.

The plenary authority that Congress explicitly conveyed to the OTS in HOLA, and that this Court recognized in *de la Cuesta*, makes explicit reference to specific subject areas unnecessary. This Court recognized that Congress gave the OTS

(Cont'd)

provided for in their loan contracts" are preempted by the HOLA Regulations) (A-92); OTS Op. Chief counsel dated November 17, 1998 (reiterating that "state laws that require lenders to pay interest on escrow accounts for hazard insurance and real estate taxes are preempted by federal law for federal savings associations") (A-94). *Accord: Wisconsin League*, 707 F. Supp. at 405 (W.D. Wis. 1989) (state statutes purporting to impose a requirement on a lender to pay interest on escrow funds were preempted by the HOLA Regulations).

the broadest possible mandate to regulate the operation of federal thrifts, and escrow accounts are included within that operation. Contrary to Petitioners' claim that escrow accounts are the "raison d'etre" for RESPA, Petition at 21, it was never the intent and purpose of RESPA to regulate federal thrifts in connection with the payment of escrow interest.

B. Congress Did Not Intend RESPA Or HUD To Regulate A Federal Association's Obligation To Pay Interest On Escrows

Despite the clear mandate given by Congress to the OTS, Petitioners contend that Congress intended under RESPA to give the Secretary of HUD exclusive authority to regulate a federal thrift's operation of a mortgage escrow account. That is a faulty premise. The language and purpose of RESPA evince that Congress did not intend RESPA or HUD to govern any lender's obligation to pay interest on escrows — a conclusion that HUD itself has confirmed in no uncertain terms.

Petitioners reach their conclusion only by ignoring the explicit language of RESPA itself, which reflects that Congress intended RESPA to govern only two issues related to escrow accounts — how the amount a borrower must deposit is calculated, and what disclosures a lender must provide. Congress enacted RESPA to provide consumers with appropriate disclosure concerning the nature and costs of the settlement process and to limit the amounts borrowers are required to pay into their escrow accounts. 12 U.S.C. § 2601 (2002). *See MorEquity, Inc. v. Naeem*, 118 F. Supp. 2d 885, 900 (N.D. Ill. 2000) (RESPA's "principal purpose is to protect home buyers from material non-disclosures in settlement statements and abusive practices in the settlement process."). Nowhere does RESPA address or in any way govern a lender's obligation to pay interest on escrow accounts. Section 2601 of RESPA,

entitled "Congressional findings and purpose," states specifically that:

> (a) The Congress finds that significant reforms in the *real estate settlement process* are needed to insure that consumers throughout the Nation *are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges* caused by certain abusive practices that have developed in some areas of the country. . . .
>
> (b) It is the purpose of this chapter *to effect certain changes in the settlement process* for residential real estate that will result —
>
> (1) *in more effective advance disclosure to home buyers and sellers of settlement costs*;
>
> (2) *in the elimination of kickbacks or referral fees* that tend to increase unnecessarily the costs of certain settlement services;
>
> (3) *in a reduction in the amounts home buyers are required to place in escrow accounts* established to insure the payment of real estate taxes and insurance; and
>
> (4) in significant reform and modernization of local recordkeeping of land title information.

12 U.S.C. § 2601(a), (b) (2001) (emphasis added).

There is no mention in any of the HUD regulations — or, indeed, anywhere in RESPA itself — of any authority to regulate escrow interest. Nonetheless, Petitioners contend that, because the HUD regulations cover certain aspects of escrow accounts, Congress intended RESPA to cover *all* aspects of escrow accounts, including a lender's obligation to pay interest on escrows. This simplistic theory proves false on analysis.

The language of RESPA itself and HUD's regulations speak very precisely to a lender's obligation to make particular types of disclosures and to implement carefully delineated accounting procedures. When a statute speaks in such specific terms, courts are not empowered to expand its scope. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201-02 (1976). RESPA's statutory scheme is not an open invitation to agency regulation of every aspect of an escrow account. *Id.* at 213-14.

Petitioners' position, if accepted, would impermissibly expand RESPA's substantive coverage beyond the statute's purpose — disclosure and accounting regulations. RESPA's legislative history "counsels *against* liberal interpretation of its remedial provisions. . . ." *Pedraza v. United Guar. Corp.*, 114 F. Supp. 2d 1347, 1354 n.13 (S.D. Ga. 2000) (emphasis added). *See also Boulware v. Crossland Mortg. Corp.*, 291 F. 3d 261, 267-68 (4th Cir. 2002) (RESPA is meant to address certain practices, not to enact broad controls, and therefore prohibition on kickbacks does not cover overcharges for credit reports); *see also Bloom v. Martin*, 77 F.3d 318, 321 (9th Cir. 1996) (RESPA does not require disclosure of reconveyance and demand fees due when a mortgagor sells his house because "RESPA's non-exhaustive list of settlement services . . . suggests a limitation to costs payable at or before settlement."); *Thomas v. Ocwen Federal Bank FSB*, 2002 WL 99737, *4 (N.D. Ill.

2002) (claims under RESPA typically accrue on the date of the closing of the loan; "fee-splitting" prohibition of RESPA does not apply to charges incurred after closing).

Notably, HUD has announced that its regulations **do not** govern interest on escrow accounts and that HUD **does not** have the statutory authority to regulate that area. During the public comment process of promulgating 24 C.F.R. § 3500.17 (Regulation X), HUD published its analysis and responses to public comments on its proposed rules explaining the history of the rule, its purpose, and the rationale underlying the final formulation of each of its provisions. In a section entitled "Interest on Escrow Accounts and Single-Item Escrow Accounts," HUD refuted the very position Petitioners espouse by stating in response to public comments that it has no authority under RESPA to regulate interest on escrow accounts. HUD stated:

> Commenters asked whether the final rule would address interest on escrow accounts. Seven commenters suggested that the rule specifically exempt servicers that either pay interest on escrow accounts or service only one escrow item. These commenters believed that a required interest payment on escrow account balances would create a disincentive to servicers to over-escrow.
>
> After considering the comments, the Department determines that it will not create the requested exemptions. *The Department does not interpret Section 10 of RESPA as providing the Department with legal authority to require payment of interest on escrow accounts. Where interest is required, it is*

> *a matter of State law, with fourteen States requiring that some amount of interest be paid on escrow account funds.*

59 Fed. Reg. at 53891 (emphasis added).[9]

In the face of HUD's clear expression of the limitations of its own authority, Petitioners' contention that HUD is the sole agency authorized to regulate interest on escrow accounts is simply baffling.

Petitioners contend that RESPA should be read to govern the payment of escrow interest because paying interest would have the practical effect of reducing the amount that borrowers are required to place in escrow accounts. The Second Circuit correctly rejected this argument, holding that

> RESPA is meant to regulate the amount of money that a borrower is required to deposit in escrow by tying that amount to the costs the escrow fund is meant to secure. RESPA is not, however, designed to reduce the dollar costs of taxes, fees, and insurance premiums. RESPA can, and does, accomplish its task by setting rules on required escrow contributions. That this system may, in the end, be more expensive to borrowers than, say, keeping their money in interest-bearing accounts to pay their own bills, does not violate RESPA's stated goal of "reduce[ing] the

9. Section 3500.17 was reissued, *see* 61 Fed. Reg. 1233 (Jan. 18, 1996), and then amended on several occasions. *See* 61 Fed. Reg. 46510 (Sept. 3, 1996); 61 Fed . Reg. 50219 (Sept. 24, 1996); 61 Fed. Reg. 58476 (Nov. 15, 1996); 63 Fed. Reg. 3236 (Jan. 21, 1998); 68 Fed. Reg. 12789 (March 17, 2003). Neither the revisions nor the accompanying HUD commentary included any further discussion of escrow interest.

> amounts home buyers are required to place in escrow accounts." 12 U.S.C. § 2601(b)(3).

Simply put, the purpose of RESPA is to protect borrowers against being required to deposit significantly more in an escrow account than is needed to pay requisite fees and expenses. Congress did not direct that purpose be accomplished by requiring the escrow account to generate income for the borrower, even if the practical effect would be to reduce the borrower's out-of-pocket costs.

Because Petitioners' premise that RESPA governs, or empowers HUD to regulate, escrow interest is incorrect, Petitioners' conclusion that RESPA supersedes HOLA is incorrect. The Second Circuit decisively rejected this contention, holding that RESPA and HOLA are not coextensive. In succinctly juxtaposed descriptions, the Second Circuit held that

> [b]y design . . . RESPA regulates a narrow field of financial transactions engaged in by a broad group of financial institutions . . . while HOLA regulates a specific breed of financial institutions in respect of all their transactions and activities. . . . Given that HOLA deals with institutions and RESPA deals with transactions, it simply does not make sense to read RESPA as superceding HOLA and preventing the OTS from asserting regulatory authority over the policies and practices of federal savings associations with respect to escrow accounts.

Opinion at 10a.

Because the statutes are not coextensive, the Second Circuit also correctly rejected Petitioners' contention that RESPA's so-called "savings clause", 12 U.S.C. § 2616, bars preemption. Indeed, this Court and others have routinely held that virtually

identical anti-preemption clauses in various federal statutes apply only to the preemptive effect of the statute in which the clause is contained.[10] That conclusion can only be correct. If §10 of RESPA does not regulate or authorize HUD to regulate interest on escrows, it follows that RESPA's "savings clause" cannot reasonably be read to interfere with the OTS' regulatory authority over this matter for federal associations.

Notably, when the OTS conducted a comprehensive review of its regulations in 1996, it reaffirmed the preemptive effect of the HOLA Regulations and also considered the interplay of those Regulations with other federal statutes, like RESPA, that "disclaim any intent to preempt non-conflicting state statutes falling in the same subject area." 61 Fed. Reg. at 50966. The OTS drew a significant distinction between RESPA, which governs all types of lenders, including state-chartered institutions, and HOLA, which governs federal savings associations. It made sense, the OTS noted, that RESPA would not preempt state laws because state-chartered banks must comply with state law and RESPA. According to the OTS, that does not, however, affect in any way the preemptive effect of the HOLA Regulations that govern federal associations, which

10. *See, e.g., United States v. Locke*, 529 U.S. 89, 106 (2000) (anti-preemption clause in Oil Pollution Act did not "extend to subjects addressed in the other titles of the Act or other acts" and therefore did not preclude preemption of state laws by Ports and Waterways Safety Act); *International Paper Co. v. Ouellette*, 479 U.S. 481, 493-94 (1987) (anti-preemption clause in citizen-suit provisions of the Clean Water Act did not "preclude preemption of state law by other provisions of the Act"); *Bank of America*, 309 F.3d at 565-66 (anti-preemption clause in Electronic Funds Transfer Act is limited to that Act and "does not save the Ordinances against preemption by the HOLA and the National Bank Act."); *Bank One v. Guttau*, 190 F. 3d 844, 850 (8th Cir. 1999) (anti-preemption provision in Iowa Electronic Funds Transfer Act does not save state regulations from preemption by National Bank Act).

are uniquely federalized institutions. In that regard, the OTS observed that the First Circuit's holding in *Greenwald*, that the HOLA Regulations preempt state laws on escrow interest,

> reflects a correct understanding of the interplay between the HOLA and the above-referenced statutes [including RESPA], as evidenced by the legislative history of the HOLA.

61 Fed. Reg. at 50966.

The Second Circuit therefore correctly rejected Petitioners' challenge to the HOLA Regulations as inconsistent with, and superseded by, RESPA.

II. The HOLA Regulations Do Not Constitute A Constitutional Taking

Petitioners claim that the Bank's conduct in not paying interest (as allowed by the HOLA Regulations) constituted a taking of Petitioners' property, in violation of the Fifth Amendment of the United States Constitution, for which they were entitled to just compensation.

As Petitioners recognize, in order to state a viable Fifth Amendment claim, they must first establish that the conduct complained of constitutes "state action." *See, e.g., American Mfrs. Mut. Ins. Co. v. Delores Scott Sullivan*, 526 U.S. 40 (1999).

Petitioners offer two theories to transform the Bank into a state actor. First, they claim that the Bank is a "federal instrumentality," which they equate, without any authority, with state action for purposes of the Fifth Amendment. Second, they claim without any support that a choice afforded by federal law is the same thing as a requirement of federal law, thereby satisfying the state action requirement. Both claims are contrary to long-established legal authority.

A. A Federal Instrumentality Is Not A State Actor

Petitioners contend that the Bank is a "federal instrumentality" and suggest that this alone demonstrates that it is a state actor. However, "[a] finding of state action may not be premised solely on the private entity's creation, funding, licensing, or regulation by the government." *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 543-44 (1987). There is no authority that a federal instrumentality is a state actor for Fifth Amendment purposes. Petitioners' reliance on only two cases, both of which are entirely inapposite, proves this to be so.

Petitioners rely principally upon *First Fed. Sav. & Loan Ass'n of Jackson County v. First Fed. Sav. & Loan Ass'n of Huntsville*, 446 F. Supp. 210 (N.D. Ala. 1978). There, one federal association sued another, asserting claims for unfair competition under state and common law. There were no Fifth Amendment claims whatsoever. The court merely noted in denying a motion to remand that "[f]ederal associations are instrumentalities and agencies of the United States," and concluded that the claims of unfair competition were governed by federal law.

Similarly, *Marquette Nat. Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), had nothing whatever to do with a Fifth Amendment claim. Rather, this Court considered whether a national bank located in Nebraska could charge its Minnesota credit card customers the higher interest rate sanctioned by Nebraska law. In ruling that it could, this Court held that a national bank is an "'instrumentalit[y] of the federal government'" and, as such, governed by federal law. 439 U.S. at 308 (citation omitted).

Thus, nothing supports Petitioners' analysis that, even if a federal savings association were a "federal instrumentality," that status would transform the association into a state actor for purposes of the Fifth Amendment.

B. The Bank's Compliance With Federal Regulations Does Not Render Its Conduct "Fairly Attributable" To The State

Petitioners also contend that the OTS Regulations, which afford the Bank the option of not paying interest on escrows (and borrowers the choice of seeking credit elsewhere) is conduct that constituted "substantial 'encouragement' or 'involvement'" sufficient to automatically transform the Bank into a "state actor." Petition at 27. That conclusion is contrary to this Court's precedent.

In *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), this Court rejected virtually the same argument, in considering the status of private insurers providing workers compensation coverage under state laws in the context of a Fourteenth Amendment and § 1983 claim. In that case, the private insurers acted in compliance with the Pennsylvania statutory workers compensation system by deferring payment for disputed medical treatment pending a review procedure set forth in the statute. The Court rejected an argument that the decision to withhold payment to providers was "fairly attributable" to the state because the state had "authorized" and "encouraged" that decision. Rather, the Court reasoned that the statute simply gave the private insurers the choice to withhold payment for disputed medical services. The Court noted that the State's decision to allow insurers to withhold payments pending review could be seen as "a legislative decision not to intervene in a dispute between an insurer and an employee over whether a particular treatment is reasonable and necessary" and held that "[s]uch permission of a private choice cannot support a finding of state action." 526 U.S. at 53-54.

In *Andrews v. Federal Home Loan Bank of Atlanta*, 998 F.2d 214 (4th Cir. 1993), the Fourth Circuit rejected the

contention that a regional federal home loan bank was a government actor. It therefore could not have violated the First Amendment when it discharged an employee pursuant to its statutory authority.[11] Noting that the bank was supervised and regulated by the Federal Home Loan Bank Board, which appointed certain of its directors and designated its chairman and vice-chairman, the Fourth Circuit nonetheless held that there was "ample reason to conclude that, despite its federal charter, the Bank operates more like a private entity than as a part of the federal government." 998 F. 2d at 216. The Fourth Circuit also rejected the notion that the defendant bank's conduct in terminating the employee was "fairly attributable" to the state, reasoning that it did not fall within any of four criteria: (1) the state did not coerce the bank to commit any act that would be unconstitutional if done by the state; (2) the state's delegation of the bank's supervisory responsibilities was not an evasion of a clear constitutional duty; (3) the state did not delegate a "traditionally and exclusively public function" to the bank, because the functions performed by the bank — banking and bank examination — "are not traditionally and exclusively public functions"; and (4) the bank did not enlist the state's aid merely by acting in furtherance of its statutory right to dismiss the employee.

Petitioners' conclusory assertion that an option is the same as a requirement for purposes of "state action" analysis has no basis. The Bank's and Petitioners' decisions to enter into a loan contract that provided for no interest was a "private choice [that] cannot support a finding of state action." *American Manufacturers*, 526 U.S. at 53-54. As expressly contemplated

---

11. The Defendant was one of twelve regional banks set up by Congress under HOLA to provide services to member institution savings-and-loans, including allowing members to secure advances against their assets. 998 F.2d at 215

by the HOLA Regulations, the decision whether to contract to pay escrow interest was a voluntary one made by private parties. As such, no constitutional "taking" occurred, and the Second Circuit properly upheld the dismissal of the Complaint on this basis as well.

Petitioners' cases refute Petitioners' own conclusion. *See San Francisco Arts & Athletics*, 483 U.S. at 543-44 (1987) (United States Olympic Committee not a government agent merely because Congress granted it a corporate charter; finding of state action may not be premised solely on the private entity's creation, funding, licensing, or regulation by the government); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 927 (1982) (state action only where there is "overt, official involvement in the property deprivation"); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (fact that private business is subject to state regulation does not convert its action into State action; fact that State responds to decisions by private nursing homes to discharge or transfer Medicaid patients by adjusting Medicaid benefits does not make State responsible for such decisions). Petitioners cannot seek relief against the Bank for the alleged unconstitutionality of the HOLA Regulations.

III. This Case Is Not Appropriate For Review Because It Poses No Important Federal And Constitutional Issues

Petitioners have not demonstrated that the Second Circuit's decision conflicts with any relevant federal or state case law or, indeed, with this Court's own relevant decisions. Rather, Petitioners speculate outside of the record in urging this Court to consider the amount of interest that might be affected by a contrary ruling. Further, citing revisions that an unrelated agency (the Office of the Comptroller of the Currency) made to regulations governing unrelated institutions (national banks), Petitioners attempt to lend urgency to their application by

inviting this Court to conclude that federal administrative agencies are embarked on an unauthorized federalist trend to displace state laws pertaining to escrow accounts.

None of these entreaties is entitled to any weight. The issue here is whether there are compelling reasons for this Court to exercise its discretion to review the Second Circuit's decision. In this case, Petitioners' claim concerning preemption is based upon inferences that they urge this Court to draw by cobbling isolated references in RESPA. Petitioners' proposed inferences, however, are at odds with (i) the conclusion of the administrator of the responsible agency, HUD, that it lacks authority to regulate escrow interest; (ii) explicit declarations of congressional intent concerning both RESPA and HOLA; and (iii) this Court's decision recognizing the plenary authority of the OTS to regulate all aspects of the lending operations of federal thrifts. As a result, the inferences Petitioners would ask this Court to draw are impermissible.

CONCLUSION

Respondent respectfully requests that this Court deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

ROBERT HERMANN
Counsel of Record
W. EDWARD BRIGHT
DOREEN KLEIN
THACHER PROFFITT & WOOD LLP
Two World Financial Center
New York, New York 10281
(212) 912-7400

Attorneys for Respondent

FILED
AUG 9 - 2005
OFFICE OF THE CLERK

(3)

No. 04-1553

IN THE

Supreme Court of the United States

HANS W. FLAGG AND EILEEN S. FLAGG, on behalf of themselves and all others similarly situated,

Petitioners,

v.

YONKERS SAVINGS AND LOAN ASSOCIATION, FA, also known as Yonkers Financial,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

MICHAEL KATZ
RABUNSKI & KATZ, LLP
630 Third Avenue, 23rd Floor
New York, NY 10017
(212) 682-6260

WILLIAM R. WEINSTEIN
Counsel of Record
ROBERT I. HARWOOD
WECHSLER HARWOOD LLP
488 Madison Avenue, 8th Floor
New York, NY 10022
(212) 935-7400

Attorneys for Petitioners

195964

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
PRELIMINARY STATEMENT	1
I. Review Is Warranted Because The Second Circuit Opinion Substantially Departs From Or Fails To Consider This Court's Controlling And Other Pertinent Decisions	1
II. Review Is Warranted Because The Second Circuit Opinion Ignores And Misapplies This Court's State Action And Taking Decisions	8
III. Review Is Warranted Because Of The Importance Of This Case	10
CONCLUSION	10

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES:

Am. Mfrs. Mut. Ins. Co. v. Sullivan,
526 U.S. 40 (1999) 9

Andrews v. Fed. Home Loan Bank of Atlanta,
998 F.2d 214 (4th Cir. 1993) 9

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991) 9

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta,
458 U.S. 141 (1982) 3, 8

First Fed. Sav. & Loan Ass'n of Boston v. Greenwald,
591 F.2d 417 (1st Cir. 1979) 3

Hawaii Hous. Auth. v. Midkiff,
467 U.S. 229 (1984) 10

Hines v. Davidowitz,
312 U.S. 52 (1941) 6

Int'l Paper Co. v. Ouellette,
479 U.S. 481 (1987) 8

Ray v. Atlantic Richfield Co.,
435 U.S. 151 (1978) 5

United States v. Locke,
529 U.S. 89 (2000) 5, 7, 8

Cited Authorities

Page

FEDERAL STATUTES, REGULATIONS AND RELATED MATERIALS:

12 C.F.R. § 545.2 8

12 C.F.R. § 560.2(a) 7

12 U.S.C. § 2601(b)(3) 6, 7

12 U.S.C. § 2609 7

12 U.S.C. § 2616 ..... 2, 3, 6, 7

59 Fed. Reg. 53,890 (Oct. 26, 1994) 3

H.R. Conf. Rep. No. 93-1526 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6569 ..... 3, 6

PRELIMINARY STATEMENT[1]

The OTS preemption regulations eliminating state law escrow interest obligations, and the Second Circuit holding that "Federal Law Preempts the Field of Mortgage Escrow Accounts Held by Federal Savings Associations" (Pet. App. A, 3a), *inter alia*, violate a fundamental precept of our federal system and the repeated holdings of this Court that when Congress so intends, respect must be accorded to the preserved regulatory power of the States.

The Fifth Amendment and the decisions of this Court, too, demand that respect be accorded by federal agencies to the property of mortgage borrowers living in the several States and territories with statutes entitling them to some amount of escrow interest.

This case squarely raises important issues regarding the Constitutional hierarchy among the branches of our federal government and between the federal government and the States that already have had, and will continue to have, an enormous collective impact on the many hundreds of thousands of affected mortgage borrowers (or more) residing throughout the United States and its territories. Petitioners respectfully submit that the Petition should be granted.

I. Review Is Warranted Because The Second Circuit Opinion Substantially Departs From Or Fails To Consider This Court's Controlling And Other Pertinent Decisions

Respondent's repeated assertion that the Petition is predicated on Congress' intent under RESPA that mortgage escrow interest be federally regulated (*e.g.*, Resp. Br. 1, 14) is a straw man, because no such intent exists or is alleged by Petitioners to exist. Rather, the Petition's RESPA-related claim

---

1. References to Petitioners' Petition and the Petition's Appendix are denoted "Pet. __" and "Pet. App.__, __" respectively. References to Respondent's Brief in Opposition are denoted "Resp. Br. __." Capitalized terms used herein are defined as in the Petition.

is based on Congress' expressed intent in 12 U.S.C. § 2616 to *preserve* the separate States' regulatory power to provide additional consumer protection regarding mortgage escrow accounts - an intent determined to be applicable to escrow interest by the Secretary (the federal administrator Congressionally delegated to make such escrow-related preemption determinations for all federally- related mortgage loans).

What Respondent characterizes as "cobbling isolated references" to arrive at a "thesis" (Resp. Br. 26, 1) is simply the plain language and obvious import of the sources most relevant to the preemption issue here: the RESPA saving clause (12 U.S.C. § 2616), its legislative history, and its interpretation by the Secretary specifically in connection with escrow interest (Pet. 6-9). Respondent, like the Second Circuit, has avoided or conclusorily dismissed these materials. For the convenience of the Court, they are again excerpted here, beginning with the saving clause:

> This chapter does not annul, alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to settlement practices, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency. The Secretary is authorized to determine whether such inconsistencies exist. The Secretary may not determine that any State law is inconsistent with any provision of this chapter if the Secretary determines that such law gives greater protection to the consumer.

The contemporaneous legislative history plainly describes Congress' intent in enacting § 2616:

> *The House amendment permits States to enforce consumer protection requirements in connection with residential real estate transactions in addition to requirements of this Act.*

> The Senate bill has no similar provision. The conference report contains the House provision with an amendment which would conform this provision to the recently enacted amendments to the Truth-in-Lending Act (Public Law 93-495) defining the relationship of that law to State laws [as enacted in 12 U.S.C. § 2616].

H.R. Conf. Rep. No. 93-1526 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6569, 6572 (emphasis added).

The Secretary's interpretation of § 2616 is equally clear:

> *Regarding the possible preemption of State laws, the Department recognizes that many of the States have enacted laws relating to escrow accounts.* . . . Given th[e] statutory language [of § 2616], and further statutory instruction that *a state statute is not to be preempted if it gives greater protection to the consumer,* the Department believes it should make specific preemption decisions on a case-by-case basis.

59 Fed. Reg. 53890, 53900 (Oct. 26, 1994) (emphasis added).

> . . .The Department does not interpret Section 10 of RESPA as providing the Department with legal authority to require payment of interest on escrow accounts. *Where interest is required, it is a matter of State law, with fourteen States requiring that some amount of interest be paid on escrow account funds.*

59 Fed. Reg. at 53891 (emphasis added). *Cf. First Fed. Sav. & Loan Ass'n of Boston v. Greenwald,* 591 F.2d 417, 420 n.3 (1st Cir. 1979) (FHLBB regulations required payment of escrow interest *if required of state lending institutions under state law* until one year after *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141 (1982) ("*de la Cuesta*")).

Respondent's answer to these sources is to argue that "[t]he issue is whether preemption by the HOLA Regulations is consistent with Congressional intent under HOLA - not under RESPA" (Resp. Br. 13). Petitioners, however, believe that the issue for this Court, fairly stated, is whether Congressional intent under HOLA *or* RESPA (or both) should be used to assess the validity of the HOLA preemption regulations as applied to state escrow interest laws.

Contrary to Respondent's (mis)characterization (Resp. Br. 13), Petitioners do *not* "contend that HOLA does not govern escrow accounts because no provision in the Act specifically mentions that area." Rather, Petitioners contend that the absence of any reference to "escrow accounts" in HOLA means that HOLA and its legislative history are not the best evidence of Congressional intent regarding the preemption of state escrow account laws (Pet. 9-10, 21). RESPA, by comparison, clearly evidences Congressional intent regarding escrow accounts and the preemption of state laws regarding escrow accounts. In such circumstances, resort to the rules of recency and specificity as aids to determining Congressional intent is proper (*see* Pet. 21).[2]

---

2. According to the Second Circuit (Pet. App. A, 10a-11a):

> The more sensible reading of these statutes is that federal savings associations, like all grantors of mortgage loans, must abide by RESPA as interpreted by the Secretary of Housing and Urban Development. The OTS cannot, therefore, promulgate rules and regulations that are contrary to RESPA. That this is so does not, however, exclude the OTS from preempting the field of rules governing federal savings associations and establishing nationwide regulations governing these institutions that are consistent with federal law, including RESPA.

Simply stated, if the RESPA saving clause interpreted by the Secretary requires the payment of escrow interest and compliance with other state escrow laws for "federally related mortgage loans," then how can the OTS preemption regulations preempting *all* state escrow laws be "consistent with federal law, including RESPA"? Note 2 to the Second Circuit Opinion is self-referentially circuitous, and provides no answer at all (*see* Pet. 19, Pet. App. A, 11a at n.2).

Based on the Second Circuit's observation that HOLA and RESPA "are not coextensive" (Pet. App. A, 10a), Respondent argues that "this Court and others have routinely held that virtually identical anti-preemption clauses in various federal statutes apply only to the preemptive effect of the statute in which the clause is contained" (Resp. Br. 19-20). Respondent's suggestion that any of this Court's preemption decisions have been "routine" is an oversimplification, at best. The Court's analysis identified by Respondent as such a "routine holding" in *United States v. Locke*, 529 U.S. 89 (2000), illustrates why the fixed rule advocated by Respondent is nothing of the sort.

As in this case, *Locke* involved the preemptive reach on Washington State law of two related, but not coextensive, federal environmental maritime acts, the Ports and Waterways Safety Act of 1972 ("PWSA") and the Oil Pollution Act of 1990 ("OPA"). *Id.* at 101. The Ninth Circuit Court of Appeals ruled, in essence, that the saving clauses of the OPA confirmed an intention to return authority to the States regarding matters which this Court earlier held were preempted by the PWSA in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). *Id.* at 104. In rejecting the Ninth Circuit's broad construction of the OPA saving clauses, this Court stated:

> Placement of the saving clauses in Title I of OPA suggests that *Congress intended to preserve state laws of a scope similar to the matters contained in Title I* of OPA, not all state laws similar to the matters covered by the whole of OPA or to the whole subject of maritime oil transport.

Locke, 529 U.S. at 105 (emphasis added). Respondent's contention that Congressional preemptive intent under RESPA is necessarily limited to "the Act" rather than "laws of a scope similar to the matters contained" therein conflicts with this

analysis, and relegates the determination of preemptive intent to a purely rote rule application.[3]

Respondent's other principal argument is that Congress did not save state escrow interest laws because Congress declined in RESPA to empower the Secretary to federally regulate escrow interest (*e.g.*, Resp. Br. 14). This argument necessarily depends on a conclusion that only the *identical* matters affirmatively regulated by RESPA were intended to be saved by 12 U.S.C. § 2616. But the RESPA legislative history, quoted *supra*, supports a broader reading of how to define the "preserve[d] state laws of a scope similar" here, and establishes that Congress intended to "permit States to enforce consumer protection requirements in connection with residential real estate transactions in addition to [*not* "identical to"] requirements of this Act." 1974 U.S.C.C.A.N. at 6572. Consistent with this expressed intent, the Secretary has interpreted § 2616 to apply to "laws relating to escrow accounts," and has specifically identified state escrow interest laws as among them.[4]

---

3. "There is not - and from the very nature of the problem there cannot be - any rigid formula or rule which can be used. . . ." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

4. The payment of escrow interest was specifically considered by Congress when RESPA was passed. *See* Pet. 8-9. And both parties cite to the Federal Register passage by the Secretary regarding "state laws regarding escrow interest," which notes the belief of commenters "that a required interest payment on escrow account balances would create a disincentive to servicers to over-escrow." *See* Pet. 7, Resp. Br. 17. One of the express purposes of RESPA is to "result . . . in a reduction in the amounts home buyers are required to place in escrow accounts." 12 U.S.C. § 2601(b)(3). Importantly, escrow interest frequently is credited directly to the escrow account balance, as with Petitioners here. Thus, if not identical to the methods adopted in RESPA, then requiring the payment of escrow interest surely is "of a scope similar to the matters contained" therein, and is entirely consistent with Congress' purpose described in § 2601(b)(3).

The presumption against preemption would have compelled the Second Circuit to interpret these sources and § 2616 more broadly than it did in rejecting Petitioners' contention that §§ 2601(b)(3) and 2609 are of a "scope similar" to state escrow interest laws (Pet. App. A, 9a-11a). Instead, citing *Locke*, the Second Circuit concluded that the longstanding, substantial federal occupation of banking caused the presumption to "disappear" (Pet. App. A, 6a). But banking is substantially different than the international maritime regulation in *Locke*, on which the Second Circuit relied for its "disappearing" conclusion. The constitution of The Bank of New York, one of the oldest banks in the United States, was written by Alexander Hamilton, the individual most actively involved in its organization, in 1784. *See* http://www.bankofny.com/htmlpages/ahi.htm. State savings and loans preceded FS&L's. And RESPA's legislative history (Pet. 8-9) confirms that state escrow account laws, including escrow interest laws, *preceded* the passage of RESPA in 1974.

As opposed to *Locke*, 529 U.S. at 108, or *de la Cuesta*, 458 U.S. at 168, this is not a case where the lack of nationwide uniformity will have a material adverse affect on the Congressionally intended federal scheme. Aside from a passing reference to the potential for "harm [to] the efficient operation of a federal association" (Resp. Br. 9), no adverse material consequence has ever been articulated by Respondent. The Second Circuit credited as reasonable (Pet. App. A, 8a) the OTS' express intention in 12 C.F.R. § 560.2(a) (Pet. App. D, 64a): "OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation." But "flexibility" is the antithesis of "uniformity," and at best a weak justification for the questionable preemption here. *See* Pet. 24 n.6.

This case presents another complication *not* present in *Locke*, because it involves not only overlapping statutes but the overlapping exercise of federal administrative authority.

As this Court has frequently observed, including in *Locke*, 529 U.S. at 110 ((quoting *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988)), a "'federal agency *acting within the scope of its congressionally delegated authority* may pre-empt state regulation'" (emphasis added). Here, it clear that the Secretary is acting within the scope of expressly delegated authority under RESPA, but nothing expressly delegates comparable authority regarding escrow accounts to the OTS. *See* Pet. 21-22. Rather, the OTS *concedes* that FS&L's are bound by RESPA (*see* Pet. 11) – a concession that is *inconsistent* with the OTS' purported "exclusive" authority described in 12 C.F.R. § 545.2 (*see* Pet. App. D, 63a). And the importance of the delegation issue has increased substantially in light of the OCC's recent escrow account preemption regulations modeled after the OTS regulations, as reflected in the Federal Register and of which this Court may properly take judicial notice. *See* Pet. 29-30.

A "saving clause" necessarily defines the "outer limits" of the power of a Congressionally delegated federal administrator to regulate, and more particularly in this case, to pre-empt. Contrary to the OTS regulations purporting to "occupy the field," and the Second Circuit conclusion that "Federal Law Preempts the Field" (Pet. App. A, 3a), "the saving clause [in this case] *negates* the inference that Congress 'left no room' for state [law]." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added). Congressional intent, as determined from all appropriate sources, must control the propriety of the OTS preemption of state escrow interest laws in this case.

II. Review Is Warranted Because The Second Circuit Opinion Ignores And Misapplies This Court's State Action And Taking Decisions

In *de la Cuesta*, this Court observed that Respondent and other FS&L's were "'establish[ed] with the force of the government behind them, with a national charter.'" 458 U.S. at 166 (quoted Resp. Br. 7) (citation omitted). As Respondent